

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

In re)
)
)
Cases Filed by DIRECTV, INC.,)
)
)
_____) O R D E R

CASE MANAGEMENT ORDER NO. 4

This Order Pertains to
the Following Related Cases:

CV 03-00884-PHX (HRH); CV 03-00967-PHX (HRH); CV 03-00968-PHX (HRH);
~~CV 03-00969-PHX (HRH);~~ CV 03-00970-PHX (HRH); CV 03-00971-PHX (HRH);
CV 03-00972-PHX (HRH); CV 03-00973-PHX (HRH); CV 03-00975-PHX (HRH);
CV 03-00976-PHX (HRH); CV 03-00977-PHX (HRH); CV 03-00978-PHX (HRH);
~~CV 03-00979-PHX (HRH);~~ CV 03-00981-PHX (HRH); CV 03-00982-PHX (HRH);
CV 03-00984-PHX (HRH); ~~CV 03-00985-PHX (HRH);~~ CV 03-00989-PHX (HRH);
~~CV 03-00991-PHX (HRH);~~ CV 03-00992-PHX (HRH); CV 03-00993-PHX (HRH);
CV 03-00995-PHX (HRH); ~~CV 03-00997-PHX (HRH);~~ CV 03-00998-PHX (HRH);
CV 03-00999-PHX (HRH); CV 03-01000-PHX (HRH); CV 03-01001-PHX (HRH);
CV 03-01002-PHX (HRH); CV 03-01424-PHX (HRH); CV 03-01774-PHX (HRH);
CV 03-01775-PHX (HRH); CV 03-01776-PHX (HRH); ~~CV 03-01777-PHX (HRH);~~
CV 03-01778-PHX (HRH); CV 03-01794-PHX (HRH); CV 03-02147-PHX (HRH);
CV 03-02148-PHX (HRH); CV 03-02149-PHX (HRH); CV 03-02181-PHX (HRH);
CV 03-02182-PHX (HRH); CV 03-02352-PHX (HRH); CV 03-02450-PHX (HRH)
[and]
CV 03-02180-PCT (HRH)
[and]
CV 03-00593-TUC (HRH); CV 03-00618-TUC (HRH)

Case Scheduling & Planning

I.

Introduction

This order is entered in each of the above-numbered cases
for the purpose of initiating the scheduling and planning process.

This order contains a number of specific information requests and compliance dates. The end result of this initial planning process will be a scheduling order implementing a plan for the early development of these cases which will be binding upon all parties to all of the above-numbered cases, irrespective of whether they have participated in the planning process.

Plaintiff is required to respond to this order. Defendants in the above-numbered cases are expected to respond to this order. Defendants in the 2004 DirecTV cases may respond to this order.

Should plaintiff become aware of the appearance or answer of a defendant in any of the above-numbered cases after the date of the docketing of this Case Management Order No. 4, plaintiff will please forthwith provide such defendant with a copy of Case Management Order No. 2 and this order.

The court has heretofore suggested the advisability of some form of organization amongst defense counsel. It is the court's perception that it would be advisable for defense counsel to have a liaison counsel who will facilitate communication between defense counsel and that it will be useful to have a "steering committee" or "coordination committee" and/or a "discovery committee" to assume some level of responsibility for organizing and directing the defense of these cases. Of course, one or both of the foregoing functions could be initiated and implemented informally by the defendants; however, if defense counsel wish to formalize any such

arrangement(s), an appropriate proposal should be presented to the court.

The court reminds the parties that the DirecTV cases have a case "site" on the District of Arizona internet page. The court will routinely post advice of the entry of orders and other developments in this case, and the full text of this and other case management orders are available electronically from the DirecTV listing.¹

It is the court's intention that a scheduling and planning order in these JMC would exclude the JMC from the provisions of Arizona Local Rule 2.12(b). All scheduling and planning in the JMC is intended to be covered by case-specific orders for the purpose of facilitating the overall management of all of the cases.

II.

General Planning and Management

A. Grouping of Cases. For purposes of this initial planning process, the court has arbitrarily selected those cases which are the most advanced in development--those filed during 2003. It is the court's perception that the 2003 cases will provide a sufficiently broad and diverse range of fact and legal circumstances to provide a meaningful basis for initial planning for all of the cases. However, the court seeks **input from the parties** as to

¹ Again, counsel may access the internet web page for the District Court of Arizona at **<http://www.azd.uscourts.gov>**, then access "What's New - **Cases of Interest**" for the DirecTV listing.

More detailed case information (the clerk's docket, for example) is available on line through "PACER" (public access to electronic records). Information for PACER registration is available on the court's internet page under "Access to Court Records".

whether it should proceed with initial planning at the present time for the 2003 cases, or whether it should postpone the planning process until all of the JMC are at issue.

Irrespective of whether the court works with two or three time-based groupings of cases or a single group for all cases, it is the court's perception that there may be other logical fact- or law-based case characteristics which might call for some type of subgrouping² that would facilitate initial case development. The court seeks **input from the parties** in this regard.

B. Statement of Issues. Ordinarily the court calls upon parties to formulate a statement of issues to be litigated. It is the court's perception that the plaintiff's complaints in these JMC, which by and large (although not exclusively) state statutory causes of action, will not require this usual formality. However, it is also the court's perception that initial discovery, for which a plan will soon be developed, is likely to demonstrate that some causes of action asserted by plaintiff are not viable as to particular defendants. The court would have plaintiff focus upon and propose to the court--at as early a date as possible--a mechanism for dropping from complaints those causes of action that early discovery shows to be inapplicable to a given defendant. It is the court's desire in this regard that plaintiff focus upon what appear to be

² For example, there may be an essentially fungible group of cases as to which plaintiff and the several defendants could agree that one case serve as the lead case for purposes of some or all of the various aspects of initial case development (and trial as to liability), with all parties bound as to the outcome in the lead case.

its strongest claims in preference to weaker ones, to the end that ongoing discovery as well as motion practice be reduced and unnecessary motion practice be avoided.

C. Early Settlements. It must by now be apparent to most if not all of the defendants that the claims being made by plaintiff are not trivial. Even if actual damages to the plaintiff in the case of a single defendant are not great, a defendant's exposure to liability for statutory damages is very significant if a violation of federal or state law is proved. Even so, it may be in a significant number of the JMC that even statutory penalties will pale in comparison to the cost of a full-blown defense. Defendants who are going to have to admit to having acquired and/or used an unauthorized device for unscrambling plaintiff's television or music transmissions should seriously consider an early settlement.

While this initial planning process is underway, the court urges plaintiff to make firm offers to defendants where they have sufficient information to formulate a settlement demand; and the court urges defendants to directly approach plaintiff during this initial planning process with a proffer of information and a settlement proposal that the plaintiff may consider.

The court will not further involve itself in the settlement process. When and if settlements are negotiated, the court should be promptly notified so that further proceedings as to settling parties may be suspended at the earliest possible time. Once a settlement is negotiated, the court will require that it be con-

summated within 30 days from the court's receipt of notice of the settlement.

D. Pro se Defendants. The court is aware that a number of defendants have, as is their right, chosen to act as their own attorney. Pro se parties are subject to the same rules, the same scheduling and planning processes, and the same obligations to comply with court orders as are parties represented by counsel. There are only very limited circumstances under which pro se plaintiffs receive any kind of "special treatment."³ By and large, the court is not in a position to assist or advise pro se defendants.

Because of the large number of JMC and the substantial similarities between them, there will in these cases be significant opportunities for pro se defendants to "follow the lead" of represented parties. However, doing that will take some effort on the part of pro se parties. They will have to monitor what is going on in other of the JMC by consulting the court's internet page, the clerk's dockets,⁴ and other case files.

III.

Discovery

In the following paragraphs, the court addresses the topic of discovery--the exchange of information between parties pursuant

³ Responding to motions for summary judgment is the only example that readily comes to mind.

⁴ The clerk's docket is a schedule of each and every paper filed in a particular case, arranged by date of filing. The docket contains a summary description of each document.

to court rules. As a general proposition, discovery is controlled by Rules 26 through 37, Federal Rules of Civil Procedure.

A. Phasing of Discovery. It is the court's perception that discovery in the JMC should be divided into perhaps three phases: disclosure, "paper" discovery,⁵ and deposition discovery. It is the court's perception that there will be expert witnesses employed in this case. Special provisions apply as regards disclosures with respect to experts and depositions of experts.⁶ The court seeks **input from the parties** as to whether and, if so, how discovery should be "phased."

B. Disclosures. **With input from the parties**, the court will fix a date by which Rule 26(a) disclosures are to be made.

These disclosures should be as complete and comprehensive as possible. The process saves time and money for everyone.

Disclosures and discovery responses must be supplemented. See Rule 26(e). The court will take **input from the parties** as to whether disclosures should be supplemented at fixed or irregular intervals through the time allowed for the completion of discovery.

With input from the parties, the court will fix a date or dates for the disclosure of expert reports from plaintiff and defendants.

⁵ By "paper" discovery, the court has reference to the exchange of information through requests for admissions (Rule 36), interrogatories (Rule 33), and requests for production (Rule 34).

⁶ Rule 26(a)(2).

Finally, as regards disclosures, the court envisions a scheduling order which will, **with input from the parties**, fix a date by which each party must disclose to the opposing party the name, address, and telephone number of each witness whom the party expects to call at trial. The court anticipates precluding the calling of any witness not so disclosed. This date is normally set about 45 days prior to the close of deposition discovery so as to afford the opposing party an opportunity to depose everyone who will be called as a witness at trial.

C. Paper Discovery. **With input from the parties**, the court will fix a period of time for the accomplishment of discovery by means of requests for admissions, interrogatories, and requests for production. In this regard, the court is open to suggestions from plaintiff as regards how it should manage the disparity which may exist between the ability of defendants who, by and large, are separately represented to respond to a set of paper discovery requests to a single client as compared to the necessity of plaintiff responding (potentially) to the same sort of discovery from approximately 40 defendants, responses to which might all fall due at about the same time.

D. Deposition Discovery. **With input from the parties**, the court will fix a date for the completion of all deposition discovery.

Except where exigent circumstances may justify an application to do otherwise, the court would expect a pretrial order to preclude deposition testimony until the time fixed for paper discov-

ery has elapsed. The court seeks **input from the parties** as regards their preferences as to how deposition discovery should be managed. While it is the court's perception that some deposition testimony (especially that from defendants) will be quite case-specific, it is also the court's perception that a great deal of the discovery which defendants may seek from plaintiff's witnesses may have application to many or all of the cases. In particular, the court seeks **input from the parties** as to how best to balance the needs of each defendant against the prohibitive (for everyone) expense of deposing plaintiff's witnesses who do not have case-specific information 40 times, once for each case. It is particularly in this area where some organization of defense counsel could prove beneficial to everyone. In particular, the court has in mind here that organized defendants should have a discovery committee that would undertake for all defendants to carry out and share with all defendants Rule 30(b)(6) and plaintiff's expert witness testimony.

E. Limits on Discovery. The court seeks **input from the parties** as to what reasonable limits should be imposed on discovery. The court is inclined to believe that the ten deposition limit of Rule 30 is excessive for each of the JMC, and that 25 interrogatories (counting separately all discrete subparts) may be insufficient.

IV.

Motion Practice

Case Management Order No. 1 stayed motion practice in the JMC. The court proposes to lift that stay on motion practice in the

above-numbered cases upon entry of a scheduling and planning order. It is the court's perception that motion practice, like discovery, should proceed in phases: Rule 12(b) motions first; discovery motions second, and, within a discrete period of time following the completion of discovery, dispositive motions that are fact-dependent. Motions in limine will be taken up at a specified time before trial.⁷

A. Preliminary Motions. **With input from the parties**, the court will fix a date by which Rule 12(b) motions and motions to amend or add parties shall be filed.⁸

The court also seeks **input from the parties** as regards the advisability of imposing a requirement that counsel confer either face-to-face or telephonically prior to the filing of any Rule 12(b) motion for the purpose of ascertaining whether or not the point which a defendant would raise under Rule 12(b) will be conceded by the plaintiff without the need of a motion.

B. Discovery Motions. **With input from the parties**, the court envisions fixing a date, probably 30 days subsequent to the

⁷ The initial scheduling and planning order will not address trial preparation (such as deposition designations, assembling, marking, and exchanging exhibits, etc.), nor will a trial date be established at that time. The court envisions the entry of a further case management order (a final pretrial order) addressing preparations immediately prior to trial and trial, which order would be entered after dispositive motion practice has been completed.

⁸ The court has already addressed the matter of motions regarding misjoinder of defendants. See Case Management Order No. 1 at 7, ¶ D.2.

completion of each phase of discovery, by which time all discovery motions should be filed.

C. Dispositive Motions. The court proposes to entertain motions for summary judgment at any time after preliminary motion practice and up to a date to be fixed with **input from counsel**-- usually 30 days following the completion of all discovery. The court will receive and consider **input from the parties** as to whether or not other restrictions on the filing of potentially dispositive motions should be imposed. A scheduling and planning order will admonish parties that motions for summary judgment that do not conform to Rule 56, Federal Rules of Civil Procedure, and/or Arizona Local Rule 1.10(1) will be summarily denied. Likewise, parties will be admonished in a scheduling and planning order that the court cannot resolve disputed issues of fact which are material to a disposition on motion for summary judgment. Where material facts are in dispute, summary judgment motions get denied.

D. Motions in Limine. Subject to receipt of **input from the parties**, the court proposes that a scheduling and planning order defer motions in limine until after all potentially dispositive motions have been decided.

E. Procedure for Defense Motion Practice. The court seeks **input from the parties** as regards how best and most efficiently to manage defense motion practice to the end that the parties and the court will need to address a given issue only once for purposes of those cases made subject to a scheduling and planning order. It is the court's perception, although the court is

certainly open to other suggestions, that a party defendant filing a Rule 12(b) motion should do the following:

- (1) Limit each Rule 12(b) motion to one specific subject.⁹
- (2) Each Rule 12(b) motion must of course be served upon plaintiff and filed with the court in the particular defendant's case.
- (3) In addition, the court would have the moving defendant serve each Rule 12(b) motion on all other defendants who are subject to the same scheduling and planning order.¹⁰
- (4) The court would propose to require that joinders in motions be served upon plaintiff and the moving defendant and filed in the case with the original motion, within 7 days from the filing of the motion.
- (5) Plaintiff's opposition would be due 15 days following the filing of the motion, and would be served upon both the moving defendant and any joining defendant(s).

⁹ While this may mean that a party will file a number of Rule 12(b) motions, addressing a single subject in each motion will facilitate processing and paper management and will make it possible for others to "join in" or "not oppose" as to a discrete issue.

¹⁰ The purpose of this requirement would be to put others on notice of the subject matter of the motion such that they may join in the motion, with or without supplementing the same.

- (6) A reply memorandum would be due in 5 days from service of the plaintiff's responding memorandum, from the moving defendant only. Joining defendants would be bound by the result of the court's ruling.
- (7) This procedure would not bar non-joining defendants from filing their own motions on a subject upon which the court has already ruled; but, as a practical matter, the parties must realize that the court will rule the same way on a second motion on the same subject absent a clear showing that the initial ruling was wrong or inapplicable to another party.

While the court perceives that the foregoing will be most useful as to Rule 12(b) motions, the court would encourage both plaintiff and defendant to **provide the court with input** aimed at organizing and simplifying motion practice to the end that repetitious motion practice be avoided.

The court would propose that a scheduling and planning order provide that the court will rarely, and only for good cause shown, permit a departure from the page limitations on motion imposed by Arizona Local Rules. See Ariz. L.R. 1.10(e).

The court proposes to expressly preclude what it characterizes as "run-on" motion practice. It is not uncommon for Party A to file a motion, and for Party B to respond to the motion and

include a new motion within the response. That practice makes paper management more difficult. Subject to **input from the parties**, the court proposes to preclude such practice.

Because the court sits in Anchorage, Alaska, the typical Arizona process for arranging motion hearings does not work very well. Parties who desire oral argument on a motion should so state in the title of their motion or response to a motion. Where oral argument is deemed appropriate and useful, the court will, after it has examined the moving papers, initiate arrangements for oral argument. Usually, oral argument will be telephonic.

V.

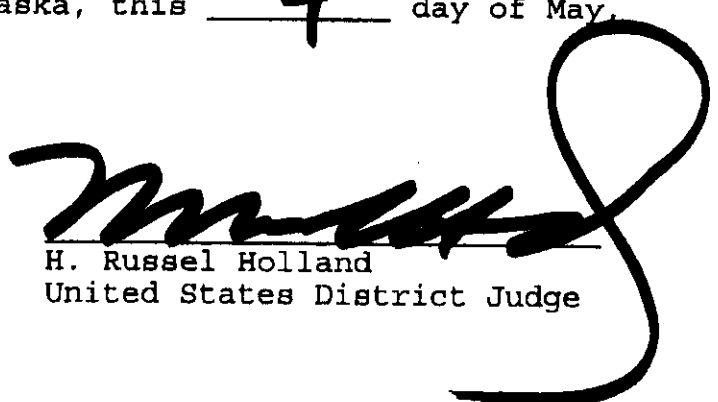
Conclusion

Ordinarily, planning procedures under Rule 16(b) and Rule 26(f), Federal Rules of Civil Procedure, require a conference of the parties. The court encourages the parties to confer with respect to the terms of this Case Management Order No. 4, but a full, formal meeting of all is not required. Rather, the court will accept individual **input from all of the parties**. The court will accept comments on any of the foregoing proposals, and expressly solicits responses as to those items which are preceded by the bold-faced words "**with input from the parties**," or words to that effect.

In order to receive full consideration by the court, responses with respect to the terms and conditions of a scheduling and planning order shall be served upon opposing parties, filed with the clerk of court, and mailed to chambers on or before May 27,

2004.¹¹ Plaintiff shall serve and file a single, identical, consolidated response in all of the above-numbered 2003 DirectTV cases. Plaintiff need therefore supply chambers with only a single copy of the unified response; however, the clerk will require an original for each file. The responses of defendants shall be served on plaintiff, a copy mailed to chambers, and the original filed in the defendant's separate file only. The court encourages, but does not require, the use of expedited delivery services to Alaska.

DATED at Anchorage, Alaska, this 4 day of May, 2004.



H. Russel Holland
United States District Judge

¹¹ The parties are reminded that they should file only the original of documents with the clerk of court. A "chambers copy" should not be left with the clerk of court. The chambers copy is to be mailed to chambers in Anchorage; leaving an extra copy with the clerk of court causes extra work.